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THE END OF LEGAL KIDNAPPING IN PENNSYLVANIA: THE DEVELOPMENT OF A DECIDED PUBLIC POLICY

FREDERICK N. FRANK†

I. INTRODUCTION

No effective sanction exists against parental kidnapping. Criminal statutes exempt parents explicitly or by judicial interpretation. Civil remedies are ineffective. Theories of tort recovery are weak and often barred by the doctrine of parental immunity. The civil contempt process is of limited applicability and may be circumvented by a contrary custody decree in another state.

Moreover, parental kidnapping is not only permitted by the courts; it is encouraged. A parent who removes his child from a state customarily is granted a custody hearing in the destination state even though that parent has defied a custody decree of the origin state.¹

THIS SEEMINGLY ARCHAIC STATEMENT was written in 1976, only four years ago. Yet, surprising as it may be to anyone familiar with today's laws,² this statement accurately summarizes the laws

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1. Comment, *Legalized Kidnapping of Children by Their Parents*, 80 DICK. L. REV. 305, 305-06 (1976).

2. For jurisdictions which have enacted the Uniform Child Custody Jurisdiction Act and thus reflect the predominant, current state of the law, *see, e.g.*, ALASKA STAT. §§ 25.30.010-.910 (1977); ARIZ. REV. STAT. ANN. §§ 8-401 to -424 (Supp. 1979-1980); ARK. STAT. ANN. §§ 34-2701 to -2726 (Supp. 1979); CAL. CIV. CODE §§ 5150-5174 (West Supp. 1979); COLO. REV. STAT. §§ 14-13-101 to -126 (1973 & Supp. 1979); CONN. GEN. STAT. ANN. §§ 46b-90 to -114 (West Supp. 1979); DEL. CODE ANN. tit. 13, §§ 1901-1925 (Supp. 1978); FLA. STAT. ANN. §§ 61.1302-.1348 (West Supp. 1978); GA. CODE ANN. §§ 74-501 to -525 (Supp. 1979); HAWAII REV. STAT. §§ 583-1 to -26 (1976); IDAHO CODE §§ 5-1001 to -1025 (1979); ILL. ANN. STAT. ch. 40, §§ 2101-2126 (Smith-Hurd Supp. 1980); IND. CODE §§ 31-1-11.6-1 to -24 (Supp. 1979); IOWA CODE ANN. §§ 598A.1-.25 (West Supp. 1979-1980); KAN. STAT. ANN. §§ 38-1301 to -1326 (Supp. 1978); LA. REV. STAT. ANN. §§ 13:1700-.1724 (West Supp. 1979); ME. REV. STAT. ANN. tit. 19, §§ 801-825 (Supp. 1979-1980); MD. ANN. CODE art. 16, §§ 184-207 (Supp. 1979); MICH. COMP. LAWS ANN. §§ 600.651-.673 (Supp. 1978-1979); MINN. STAT. ANN. §§ 518A.01-.25 (Supp. 1980); MO. ANN. STAT. §§ 452.440-.550 (Vernon Supp. 1979); MONT. REV. CODES ANN. §§ 40-7-101 to -125 (1979); NEB. REV. STAT. §§ 43-1201 to -1225 (Supp. 1979); 1979 Nev. Stat. 134; N.H. REV. STAT. ANN. §§ 458-A:1-.25 (Supp. 1979); N.J. STAT. ANN. §§ 2A:34-28 to -52 (West Supp. 1979-1980); N.Y. DOM. REL. LAW §§ 75-a to -z (McKinney Supp. 1979-1980); N.C. GEN. STAT. §§ 50A-1 to -25 (Supp. 1979); N.D. CENT. CODE §§ 14-14-01 to -26 (1979); OHIO REV. CODE ANN. §§ 3109.21-.37 (Anderson 1980); OR. REV. STAT. §§ 109.700-.930 (1977); 11 PA. CONS. STAT. ANN. §§ 2301-2325 (Purdon Supp. 1980); R.I. GEN. LAWS §§ 15-14-1 to -26 (Supp. 1979); S.D. COMP. LAWS ANN. §§ 26-5-5 to -52 (Supp. 1978); VA. CODE §§ 20-125 to -146 (Supp. 1979); WIS. STAT. ANN. §§ 822.01-.25 (West Supp. 1977); WYO. STAT. §§ 20-5-101 to -125 (1977). For a discussion of the Uniform Child Custody Jurisdiction Act, *see* notes 96-137 and accompanying text *infra*.

which existed throughout many parts of the nation regarding parental kidnapping at the time.³ Indeed, nowhere was the description more appropriate than in the Commonwealth of Pennsylvania.

Prior to 1977, the Commonwealth lacked a civil statute barring parental kidnapping and the lone criminal statute⁴ proscribing such activity was rarely utilized.⁵ Thus, forum shopping by abducting parents was the rule of the day. This practice was encouraged by United States Supreme Court⁶ and Pennsylvania appellate court decisions⁷ which failed to condemn the removal of children to other jurisdictions in outright defiance of court orders.

The adverse effects of legally sanctioned child snatching did not go unnoticed by the National Conference of Commissioners on Uniform State Laws, who, in 1968, adopted the Uniform Child Custody Jurisdiction Act (UCCJA).⁸ The UCCJA, in the view of the Commissioners, was enacted with the purpose of bringing "some semblance of order into the existing chaos"⁹ created by the lack of finality of custody decrees.¹⁰

The Commissioners were not merely motivated by a purely legal concern but were also guided by an awareness of the vast human

3. See Comment, *supra* note 1, at 305.

4. See 18 PA. CONS. STAT. ANN. § 2904 (Purdon 1978). Under this statute any person who "knowingly or recklessly takes or entices any child under the age of 18 years from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so" is guilty of a misdemeanor. *Id.*

5. See *Commonwealth v. Chubb*, 3 Pa. D. & C.3d 676 (C.P. Cumberland 1977). In the *Chubb* case, the court observed that criminal sanctions have rarely been used in this context due to a general reluctance on the part of courts to impose criminal penalties upon a parent who removes his own child from the possession of the other parent. See *id.* at 678. The court, however, determined that the purpose of § 2904 was to overcome this inhibition and punish those who take the law into their own hands. *Id.* See 18 PA. CONS. STAT. ANN. § 2904 (Purdon 1978); note 4 *supra*. Nonetheless, *Chubb* is the only reported case in which criminal sanctions have been imposed on a kidnapping parent.

6. See, e.g., *Ford v. Ford*, 371 U.S. 187 (1962); *May v. Anderson*, 345 U.S. 528 (1953); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947); notes 54-91 and accompanying text *infra*.

7. See, e.g., *In re Irizarry*, 195 Pa. Super. Ct. 104, 169 A.2d 307, *cert. denied*, 368 U.S. 928 (1961); *Commonwealth ex rel. Freed v. Freed*, 172 Pa. Super. Ct. 276, 93 A.2d 863 (1953); notes 17-53 and accompanying text *infra*.

8. UNIFORM CHILD CUSTODY JURISDICTION ACT §§ 1-28, *reprinted in* 9 UNIFORM LAWS ANN. 111 (1979). For a list of the states which have enacted the UCCJA, see note 2 *supra*.

9. UNIFORM CHILD CUSTODY JURISDICTION ACT, Commissioners' Prefatory Note, *reprinted in* 9 UNIFORM LAWS ANN. 111, 114 (1979).

10. See *id.*, *reprinted in* 9 UNIFORM LAWS ANN. 111, 112 (1979). The Commissioners noted:

It is well known that those who lose a court battle over custody are often unwilling to accept the judgment of the court. They will remove the child in an unguarded moment . . . and will seek their luck in the court of a distant state where they hope to find—and often do find—a more sympathetic ear for their plea for custody.

Id. See generally *id.* § 1 (section stating the purposes of the Act), *reprinted in* 9 UNIFORM LAWS ANN. 111, 116 (1979).

costs of continued uncertainty in the custody process. They noted that the lack of finality in custody matters introduced elements of insecurity and instability into many young lives, threatening the emotional well-being of these children.¹¹

With the UCCJA's concern for children as an impetus, Pennsylvania's role as the protector of the kidnapping parent has been completely reversed.¹² Through both legislative¹³ and judicial action,¹⁴ the Commonwealth has formulated a decided public policy which denies aid and comfort to a parent who takes a child from the other parent in contravention of a valid court order.

This article will trace the development of Pennsylvania's current policy, comparing the previous law with today's impediments to parental kidnapping.¹⁵ In addition, it will discuss some of the deficiencies in the current law which have the potential to lessen its effectiveness.¹⁶

II. PENNSYLVANIA'S LAW PRIOR TO THE CHILD CUSTODY ACTS—A HAVEN FOR CHILD-SNATCHERS

Prior to Pennsylvania's enactment of the UCCJA¹⁷ and the Commonwealth Child Custody Jurisdiction Act (CCCJA),¹⁸ a noncustodial parent who contemplated abducting a child from a custodial parent in Pennsylvania or any other state, could count on considerable help from the Pennsylvania courts which gave prior custody awards little effect.¹⁹

The classic parental kidnapping case generally occurred in the following manner. Custody of the child was awarded to one parent by a court in State A where the child resided.²⁰ Pursuant to the parties'

11. UNIFORM CHILD CUSTODY JURISDICTION ACT, Commissioners' Prefatory Note, reprinted in 9 UNIFORM LAWS ANN. 111, 112 (1979). One of the stated purposes of the UCCJA is to "discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child." *Id.* § 1(a)(4), reprinted in 9 UNIFORM LAWS ANN. 111, 117 (1979).

12. See generally notes 92-194 and accompanying text *infra*.

13. See Uniform Child Custody Jurisdiction Act, PA. STAT. ANN. tit. 11, §§ 2301-2325 (Purdon Supp. 1980); Commonwealth Child Custody Jurisdiction Act, PA. STAT. ANN. tit. 11, §§ 2401-2424 (Purdon Supp. 1980); notes 92-150 and accompanying text *infra*.

14. See notes 152-78 and accompanying text *infra*.

15. See notes 17-53 & 92-150 and accompanying text *infra*.

16. See notes 150-78 and accompanying text *infra*.

17. PA. STAT. ANN. tit. 11, §§ 2301-2325 (Purdon Supp. 1980).

18. PA. STAT. ANN. tit. 11, §§ 2401-2424 (Purdon Supp. 1980).

19. See notes 22-53 and accompanying text *infra*. The UCCJA deals with interstate child abduction, the CCCJA with intrastate (inter county) incidents. See PA. STAT. ANN. tit. 11, §§ 2302, 2402 (Purdon Supp. 1980); notes 92-150 and accompanying text *infra*.

20. The terms "residence" and "domicile" generally have different meanings. See *In re Lesker*, 377 Pa. 411, 418, 105 A.2d 376, 380 (1954). For purposes of the discussion of prior

agreement allowing the noncustodial parent visitation rights, the child would go to the state *B* residence of the noncustodial parent for a short visit. At some point, either before or during the child's visit, the noncustodial parent would formulate a desire for full custody. Eventually, that parent would file a complaint in state *B* seeking custody of the child.²¹

Under such circumstances, the Pennsylvania courts had consistently held that they had jurisdiction to adjudicate the noncustodial parent's petition despite the fact that Pennsylvania's contacts with the child were de minimis.²² A case in point is *In re Irizarry*.²³ In *Irizarry*, a court in Puerto Rico had awarded custody of two minor children to their father who resided with them in Puerto Rico.²⁴ The children then came to Pennsylvania to visit their mother.²⁵ Thirteen days after the children arrived in Pennsylvania, the mother filed a petition in the local court of common pleas requesting custody.²⁶ The father entered preliminary objections to the court's jurisdiction, claiming 1) that a Pennsylvania court was obligated to afford full faith and credit to the custody decree entered in Puerto Rico,²⁷ and 2) that the Pennsylvania court did not have jurisdiction to determine custody because the children were in the state merely for a short visit.²⁸ The court of common pleas dismissed both prelimi-

Pennsylvania law, however, the words are used interchangeably since either domicile or residence of the child in Pennsylvania was sufficient to vest jurisdiction in the state's courts. See *In re Irizarry*, 195 Pa. Super. Ct. 104, 106, 169 A.2d 307, 309, cert. denied, 368 U.S. 928 (1961).

21. The facts of the hypothetical in the text are based upon the case of *In re Irizarry*, 195 Pa. Super. Ct. 104, 106, 169 A.2d 307, 308, cert. denied, 368 U.S. 928 (1961).

In Pennsylvania, actions challenging a party's right to have legal custody of a child are initiated by a petition for a writ of habeas corpus. See 42 PA. CONS. STAT. ANN. § 6503 (Purdon 1979). See also A. MOMJIAN & N. PERLBERGER, PENNSYLVANIA FAMILY LAW § 5.6.1 (1977).

22. See, e.g., *Commonwealth ex rel. Graham v. Graham*, 367 Pa. 553, 560, 80 A.2d 829, 833 (1957); *Commonwealth ex rel. Logan v. Toomey*, 241 Pa. Super. Ct. 80, 84-85, 359 A.2d 468, 470 (1976); *Coombs v. Coombs*, 225 Pa. Super. Ct. 304, 307, 303 A.2d 498, 499 (1973); *In re Irizarry*, 195 Pa. Super. Ct. 104, 109, 169 A.2d 307, 309, cert. denied, 368 U.S. 928 (1961).

The exercise of jurisdiction despite the lack of significant contacts between the forum and the child was a matter of serious concern to the drafters of the UCCJA. See UNIFORM CHILD CUSTODY JURISDICTION ACT, § 1(a)(3), reprinted in UNIFORM LAWS ANN. 111, 117 (1979). A stated purpose of the Act is to assure that custody litigation will generally take place in the state with which the child and his family have the closest connections and in which evidence concerning the child's care, protection, training, and personal relationships is most readily available. *Id.*

23. 195 Pa. Super. Ct. 104, 169 A.2d 307, cert. denied, 368 U.S. 928 (1961).

24. 195 Pa. Super. Ct. at 106, 169 A.2d at 308.

25. *Id.* The mother had remarried and was living in Pennsylvania. *Id.*

26. *Id.*

27. *Id.* For a discussion of United States Supreme Court decisions concerning full faith and credit for custody decrees, see notes 54-91 and accompanying text *infra*.

28. 195 Pa. Super. Ct. at 106, 169 A.2d at 308.

nary objections²⁹ and, on appeal, the Superior Court of Pennsylvania affirmed.³⁰

In rejecting the father's contentions, the superior court maintained that a prior custody decree rendered by a sister jurisdiction was entitled to full faith and credit only "so far as it determined the status of the child at the time it was issued";³¹ thus, if a Pennsylvania court had jurisdiction over the child it could render a new decree.³²

The court had little trouble determining that it had sufficient jurisdiction to redetermine the custody issue despite the fact that the children were in Pennsylvania only thirteen days when the complaint for custody was filed.³³ Applying Pennsylvania's rule that jurisdiction in custody cases follows either the domicile or residence of the child,³⁴ the court held that the children's presence in the state for visitation purposes constituted residence and, hence, there was jurisdiction to hear the case.³⁵

29. *Id.*

30. *Id.* at 110, 169 A.2d at 310.

31. *Id.* at 107-08, 169 A.2d at 308-09. The court based its determination on the fact that custody decrees are temporary in nature and are therefore modifiable in light of changing conditions. *Id.* at 108, 169 A.2d at 309. This position was consistent with that of the first *Restatement of Conflict of Laws*. See *RESTATEMENT OF CONFLICT OF LAWS* §§ 147-48. The *Restatement's* position was that a valid custody decree must be enforced in all states. *Id.* § 147. If another state found, however, that the custodian of the child was unfit, then the state, if it had jurisdiction, could make a new custody determination. *Id.* § 148. For a general discussion of custody decrees and the full faith and credit clause, see H. CLARK, *LAW OF DOMESTIC RELATIONS* § 11.5 (1968); Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953); notes 54-91 and accompanying text *infra*.

32. 195 Pa. Super. Ct. at 109, 169 A.2d at 309.

33. See *id.* at 108, 169 A.2d at 309.

34. *Id.* The jurisdictional rule applied by the court in *Irizarry* represents only one of various analytical approaches to jurisdiction in custody cases which have been employed in the United States. See Comment, *supra* note 1, at 314-17. Other jurisdictions have applied a strict domicile-of-the-child test, or a personal-jurisdiction-over-the-parents test to determine if they possessed the power to render a custody decree. See *id.*

Professor Clark has expressed the belief "that judicial opinions on [custody jurisdiction] are in hopeless conflict." H. CLARK, *supra* note 31, § 11.5, at 320. He reasoned that the jurisdictional analysis in custody cases differs from the approach taken in other areas of the law because in custody cases, courts seem to decide the merits of the dispute before the jurisdictional issue. Thus, if a court believed that a custody decree was in the best interests of the child it would grant the decree, resting jurisdiction on any contacts it could find between the forum and the parties. *Id.* A plurality of the United States Supreme Court has concluded that personal jurisdiction over both parents is necessary to render a valid custody decree. See *May v. Anderson*, 345 U.S. 528, 531 (1953). For a discussion of *May*, see notes 63-76 and accompanying text *infra*.

35. 195 Pa. Super. Ct. at 109, 169 A.2d at 309. The court relied on a definition of residence as "a tarrying place for some specific purpose of business or pleasure." *Id.*, citing *In re Lesker*, 377 Pa. 411, 418, 105 A.2d 376, 380 (1954). The court in *Irizarry* agreed that the child was not a Pennsylvania domiciliary for the domicile of a child is that of the custodial parent. See 195 Pa. Super. Ct. at 108, 169 A.2d at 309.

The *Irizarry* case was interpreted to allow Pennsylvania courts to take custody jurisdiction any time a child was present in the state even though there was a prior foreign state order expressly retaining jurisdiction over the matter or forbidding removal of the children.³⁶ Throughout the years in which *Irizarry* was repeatedly followed,³⁷ the only jurisdictional barrier that faced a parent seeking custody was the fact that the courts would not entertain custody complaints before the child's arrival in Pennsylvania.³⁸

Intrastate custody disputes, where the child snatching occurred across county lines, were subject to the same jurisdictional analysis as were interstate disputes. In *Commonwealth ex rel. Freed v. Freed*,³⁹ the local court of common pleas awarded custody of a minor girl to the mother and visitation rights to the father.⁴⁰ The mother reestablished her domicile in another county and subsequently refused to allow the father to see the child in clear contravention of the custody decree.⁴¹ In response to the denial of visitation, the court of common pleas revoked its original order and entered a new decree granting custody to the father.⁴² The mother then filed a petition requesting the court to rescind its second order which it refused to do.⁴³ On appeal, the Superior Court of Pennsylvania held that the lower court

The result of the holding in *Irizarry* was to afford no deference whatsoever to the Puerto Rico decree since, on the merits, the Pennsylvania court was not confined to a consideration of new circumstances but could also reexamine the facts which led to the original decree. See *id.* See also *Commonwealth ex rel. Schofield v. Schofield*, 173 Pa. Super. Ct. 631, 641, 98 A.2d 437, 441 (1953).

36. See *Commonwealth ex rel. Mason v. Mason*, 213 Pa. Super. Ct. 433, 437, 249 A.2d 922, 925 (1968).

37. See, e.g., *Commonwealth ex rel. Thomas v. Gillard*, 203 Pa. Super. Ct. 95, 99, 198 A.2d 377, 379 (1964); *Commonwealth ex rel. Lovell v. Shaw*, 202 Pa. Super. Ct. 339, 343, 195 A.2d 878, 880 (1963).

38. See *Commonwealth ex rel. Blank v. Rutledge*, 234 Pa. Super. Ct. 339, 342, 339 A.2d 71, 74 (1975). In *Blank*, the father, a Pennsylvania resident, has been awarded visitation rights by a New Jersey court. *Id.* at 341, 339 A.2d at 71. Prior to one of the scheduled visits, the father filed a petition for custody in Pennsylvania which was granted. *Id.* at 342, 339 A.2d at 71-72. A plurality of the superior court reversed, holding that it was error for the lower court to have assumed jurisdiction over the matter before the child entered the state. *Id.* at 347, 339 A.2d at 74. The plurality, in accord with the rule in *Irizarry*, stated that while custody decrees are modifiable in light of changing conditions, "[t]he child must however, be within the jurisdiction of the decree-granting state; otherwise the state is without power to determine its status." *Id.* at 343-44, 339 A.2d at 72-73. A reasonable inference from *Blank* is that all the father had to do in order to have been successful was wait until the visitation period began before he filed his complaint.

39. 172 Pa. Super. Ct. 276, 93 A.2d 863 (1953).

40. *Id.* at 278, 93 A.2d at 863.

41. *Id.* at 278, 93 A.2d at 864.

42. *Id.*

43. *Id.* at 279, 93 A.2d at 864.

was without jurisdiction to modify its initial order since at the time of the modification the child was no longer a domiciliary or a resident of the county.⁴⁴

The *Freed* case is not a classic example of child snatching⁴⁵ for it did not involve the taking of a child by a noncustodial parent across county borders to escape a prior custody decree. The practical effect of its holding, however, as applied in subsequent cases,⁴⁶ was that such a taking could occur in Pennsylvania with impunity. Since the court which entered the original decree in *Freed* lacked jurisdiction to modify its order once the child left the county, there was nothing to stop another court from entering a new decree.⁴⁷ Thus, the law in Pennsylvania clearly encouraged parents to move children both inter- and intrastate from jurisdiction to jurisdiction in order to escape possible adverse custody decisions.

Another consequence of Pennsylvania's law prior to enactment of the UCCJA and CCCJA was the ability of a custodial parent to thwart a noncustodial parent's partial custody or visitation rights by fleeing the jurisdiction.⁴⁸ As a general proposition, when a custodial parent refused to honor the noncustodial parent's visitation rights, the Pennsylvania courts would enforce the noncustodial parent's prima facie right to visitation.⁴⁹ However, as illustrated by *Freed*, the custodial parent could take the child out of the county or state, stripping the original court of jurisdiction.⁵⁰ If the preceding scenario oc-

44. *Id.* at 280, 93 A.2d at 864. The court stated:

When that order was made neither the mother nor the minor child resided in Washington County nor was present in the county at that time. The jurisdiction of a court in a proceeding involving custody is determined by the domicile or residence of the child. . . . [W]hen [the mother] took the child with her and established a new residence . . . the child acquired the domicile of its mother in Bedford County. . . . While the court had the authority to make the original order, it lost its jurisdiction to modify or make a new order when both parents left Washington County.

Id.

45. See notes 20-21 and accompanying text *supra*.

46. See, e.g., *Commonwealth ex rel. Hickey v. Hickey*, 216 Pa. Super. Ct. 332, 336, 264 A.2d 420, 422 (1970); *Swigart v. Swigart*, 193 Pa. Super. Ct. 174, 177, 163 A.2d 716, 718 (1960).

47. See Commonwealth Child Custody Jurisdiction Act, PA. STAT. ANN. tit. 11, § 2402(a)(1) (Purdon Supp. 1980). One of the stated purposes of the CCCJA is to "avoid jurisdictional competition and conflict with courts of the respective counties of the Commonwealth in matters of child custody which in the past resulted in the shifting of children from county to county with harmful effects on their well-being." *Id.* See also 1 PA. LEG. J. 1092 (House daily ed. April 12, 1978) (remarks of Rep. Rhodes).

48. See *Commonwealth ex rel. Freed v. Freed*, 172 Pa. Super. Ct. at 278, 93 A.2d at 864. The reason for the attempted modification of the initial custody decree in *Freed* was that the mother had denied the father visitation with the child. *Id.* For a discussion of the facts in *Freed*, see notes 39-44 and accompanying text *supra*.

49. See, e.g., *Commonwealth ex rel. Sorace v. Sorace*, 236 Pa. Super. Ct. 42, 44, 344 A.2d 553, 554 (1976); A. MOMJIAN & N. PERLBERGER, *supra* note 21, § 5.5.

50. See notes 39-47 and accompanying text *supra*.

curred, the noncustodial parent would be forced to begin anew the quest for enforcement of his or her rights in another jurisdiction, provided the child could be located at all.⁵¹

Thus, Pennsylvania law prior to the enactment of the UCCJA and CCCJA provided no deterrent to the parent who wished to shop around for a favorable decree.⁵² It cannot be said, however, that the Pennsylvania courts were out of step with contemporary juridical views since, during the same period, the decisions of the nation's highest court in this area did much to further the confusion caused by conflicting custody orders.⁵³

III. THE UNITED STATES SUPREME COURT'S DENIAL OF FULL FAITH AND CREDIT IN INTERSTATE CUSTODY DISPUTES

The United States Constitution provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."⁵⁴ Armed with this provision, parents who were the victims of child snatching sought relief from the United States Supreme Court.⁵⁵ They found, however, that the Court would not interpret the Constitution to bar relitigation of custody decrees.⁵⁶

The first case in which the Court confronted the constitutional implications of parental kidnapping was *New York ex rel. Halvey v. Halvey*⁵⁷ where the Court upheld a New York court's modification of

51. See generally *Kidnapping: A Family Affair*, NEWSWEEK, Oct. 18, 1976, at 24; *Moving to Stop Child Snatching*, TIME, Feb. 27, 1978, at 85. It is suggested that the jurisdictional analysis favored by the Pennsylvania courts also worked against the interests of the noncustodial parent who tried to obtain a modification of a custody decree, because it permitted the custodial parent to leave the jurisdiction and thereby force the other parent to litigate away from home.

52. See notes 22-51 and accompanying text *supra*. Ironically, even where a custodial parent fled to escape the jurisdiction of a court in a custody matter, that parent could still require the payment of support. See REVISED UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT, 42 PA. CONS. STAT. ANN. § 6770 (Purdon Supp. 1980) (a pending custody action in another state does not stay a support action in Pennsylvania provided that the other jurisdictional requisites are met).

53. See notes 54-91 and accompanying text *infra*.

54. U.S. CONST. art. IV, § 1. This section of the Constitution also provides that "the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." *Id.* The statute implementing this grant of authority requires in part that "[s]uch Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1736 (1976).

55. See, e.g., *Ford v. Ford*, 371 U.S. 187 (1962); *May v. Anderson*, 345 U.S. 528 (1953); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

56. See notes 57-91 and accompanying text *infra*.

57. 330 U.S. 610 (1947).

a custody order originally issued by a Florida court.⁵⁸ In so holding, the Court reasoned that the full faith and credit clause does not require that a judgment be accorded "a more conclusive or final effect in the state of the forum than it has in the state where rendered."⁵⁹ In Florida, custody orders were not considered to be final and were modifiable whenever the welfare of the child required it.⁶⁰ Thus, the Court held that the New York court could also modify the decree.⁶¹ In a prophetic concurrence, Justice Rutledge recognized that the Court's decision made "possible a continuing round of litigation over custody, perhaps also of abduction, between alienated parents."⁶²

The question of whether a custody decree rendered without personal jurisdiction over a contesting parent is entitled to full faith and credit was discussed by the Court in *May v. Anderson*.⁶³ In *May*, the father obtained an ex parte divorce and custody order from a Wisconsin court.⁶⁴ The mother had been served with process but chose not to appear in the action.⁶⁵ Subsequently, the mother, who had moved to Ohio two months prior to the ex parte divorce, refused to return the children after a visit.⁶⁶ The father filed a petition for habeas corpus in Ohio challenging the right of the mother to retain custody.⁶⁷ The Ohio court held for the father on the ground that the

58. *Id.* at 615. In *Halvey*, the mother instituted a divorce proceeding in Florida obtaining service of process on the father, a New York resident, by publication. *Id.* at 611. The father made no appearance in the action and subsequently the Florida court granted the mother a divorce, awarding her permanent custody of the child. *Id.* at 611-12. The day prior to the issuance of that decree, the father took the child back to New York without the mother's knowledge or consent. *Id.* at 611. The mother filed a habeas corpus petition in New York challenging the father's detention of the child. *Id.* After a hearing, the New York court modified the terms of the Florida order by, *inter alia*, allowing the father visitation rights and custody of the child during vacations. *Id.* at 612.

59. *Id.* at 614, citing *Reynolds v. Stockton*, 140 U.S. 254, 264 (1890).

60. See 330 U.S. at 612.

61. *Id.* at 614-15.

62. *Id.* at 619-20 (Rutledge, J., concurring). Justice Jackson concurred separately on the ground that Florida had no jurisdiction to issue the initial decree. *Id.* at 616 (Jackson, J., concurring). Similarly, Justice Frankfurter rested his concurrence on grounds relating to the validity of the initial decree. *Id.* at 619 (Frankfurter, J., concurring).

63. 345 U.S. 528 (1952). The *Halvey* Court had expressly left open the question of whether a custody decree rendered without in personam jurisdiction over one or both of the parents could have any binding effect over such nonparty parents. 330 U.S. at 615.

64. 345 U.S. at 530-31.

65. *Id.* at 531. The mother had been personally served with process in Ohio pursuant to a Wisconsin statute which allowed such service in divorce proceedings. *Id.* The statute was not, however, applicable to custody proceedings. *Id.* The mother thus asserted a lack of jurisdiction in relation to the custody decree only. *Id.*

66. *Id.* at 532.

67. *Id.* In Ohio, habeas corpus was available only to determine who had the right to immediate possession of the children. *Id.* It was not available to modify any former custody awards. *Id.* Compare this procedure with that followed in *Halvey* where, in a habeas corpus

Wisconsin custody decree was entitled to full faith and credit.⁶⁸ On appeal, the United States Supreme Court reversed.⁶⁹

Writing for a plurality of the Court,⁷⁰ Justice Burton reasoned that a mother's right to custody is a personal right and therefore cannot be denied by a court which lacks personal jurisdiction over her.⁷¹ Thus, the plurality found that since the Wisconsin custody

proceeding, a New York court modified a prior Florida decree reexamining all the facts it deemed necessary to determine what the child's welfare required. *See id.* at 532 & n.4, citing *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 615 (1947). Thus, unlike the *Halvey* Court, the *May* Court could not base its determination on the lack of finality of the initial foreign decree since the Ohio court could not, under that state's habeas corpus procedure, modify the original decree. Therefore, the *May* Court had to reach the question of the validity of the initial custody order. *See* 345 U.S. at 532. For a discussion of the use of the writ of habeas corpus in custody cases, *see* H. CLARK, *supra* note 31, § 17.3.

68. 345 U.S. at 529.

69. *Id.* at 535.

70. A majority of the court consisting of Justices Burton, Vinson, Black, Douglas, and Frankfurter agreed that the Wisconsin decree was not entitled to full faith and credit. *See id.* at 534 (plurality opinion); *id.* at 535 (Frankfurter, J., concurring). The four-member plurality rested its decision on the ground that there was a jurisdictional defect in the initial decree. *Id.* at 533 (plurality opinion). *See* notes 71-72 and accompanying text *infra*. Justice Frankfurter decided the issue on other grounds. *See* 345 U.S. at 535-36 (Frankfurter, J., concurring); note 71 *infra*.

71. 345 U.S. at 533-34 (plurality opinion). The plurality in making its jurisdictional finding referred to the doctrine of divisible divorce. *Id.* & n.6. Applying this doctrine, the Court had previously held that a state which is the domicile of one of the marital partners may grant a divorce decree which is entitled to full faith and credit insofar as it dissolves the marital status, even though the granting court lacks personal jurisdiction over the nonresident party. *See* *Kreiger v. Kreiger*, 334 U.S. 555 (1948); *Estin v. Estin*, 334 U.S. 541 (1948). In those same cases, however, the Court also held that the due process clause prohibits a court from altering the legal incidences of marriage, such as alimony or support, without personal jurisdiction over both parties. *See* 334 U.S. at 557; 334 U.S. at 549.

The jurisdictional predicate of Justice Burton's opinion created problems for the drafters of the UCCJA. *See* Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1232-33 (1969). Bodenheimer was the reporter for the Special Committee of the Commissioners on Uniform State Laws which prepared the UCCJA. *Id.* at 1207. In the Vanderbilt article, she states that the drafters of the Act attempted to accommodate the *May* plurality's position that in personam jurisdiction over the parent was required by developing a long-arm provision which would have granted courts jurisdiction to reach parents who had fled out of state in the face of a custody action. *Id.* at 1232. Bodenheimer contends that the drafters abandoned their efforts because they felt that they could not design a provision which would reach a parent who had never been a resident of the forum state. *See id.*; *cf.* *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (due process requires that a defendant have sufficient minimum contacts with the forum).

Justice Frankfurter, in his concurring opinion, criticized the plurality's jurisdictional approach. *See* 345 U.S. at 535-36 (Frankfurter, J., concurring). Questioning the plurality's reliance on *Kreiger* and *Estin*, he claimed that the interests at stake in custody cases are different from those in marital property determinations and, therefore, although ex parte alimony and property division orders violate due process, it does not necessarily follow that a custody decree, rendered without in personam jurisdiction over a parent, violates that parent's due process rights. *See id.* at 536 (Frankfurter, J., concurring). Hence, Justice Frankfurter concluded that the plurality had merely held that the full faith and credit clause does not require prior custody decrees to be accorded binding effect, thus leaving state courts free to give these decrees comity if the

decree was rendered without in personam jurisdiction, it was not entitled to be given full faith and credit by the Ohio courts.⁷²

In his dissenting opinion in *May*, Justice Jackson severely criticized the Court's ruling.⁷³ He considered anomalous the plurality's conclusion "that the state in which a child and one parent are domiciled and which is primarily concerned about his welfare cannot constitutionally adjudicate controversies as to his guardianship."⁷⁴

As a result of the plurality opinion in *May*, a parent who anticipated a custody action by the other parent, or who was actually aware of the initiation of such an action but had not yet been served with process, could remove himself from the jurisdiction and constitutionally avoid a subsequent custody decree issued by a court in that jurisdiction.⁷⁵ This result is even more disturbing when one recognizes that Wisconsin, the state where the custody proceeding was initiated in *May*, was the logical forum to determine custody since the children had resided there most of their lives and most relevant information concerning their welfare was present there.⁷⁶ Still, a plurality of the court believed that Wisconsin had no jurisdiction because one parent had fled to Ohio, a conclusion which seems to fail to take the interests of the children into account.

The Court's opinion in *Ford v. Ford*⁷⁷ is another striking example of the Court's reluctance to use the full faith and credit clause to bar relitigation of custody status by one state after a decree has been

courts so choose. *Id.* at 535 (Frankfurter, J., concurring). For Justice Frankfurter, this reading of the plurality's opinion was necessarily the only proper one in light of his belief that the interest of a state in the welfare of the child overrides the "interest of national unity that underlies the Full Faith and Credit Clause." *Id.* at 536 (Frankfurter, J., concurring).

The Frankfurter opinion, with its suggested limitation on the plurality approach, has been interpreted to allow states to recognize a foreign custody decree despite the absence of personal jurisdiction over a parent. See Bodenheimer, *supra*, at 1232. Any other reading would leave open the possibility of upsetting a child's life at a later time by permitting subsequent challenges by noncustodial parents who assert that the court which issued the decree deprived them of a property interest without due process. *Id.*

72. 345 U.S. at 533 (plurality opinion).

73. *Id.* at 536-42 (Jackson, J., dissenting).

74. *Id.* at 539 (Jackson, J., dissenting). Justice Jackson, unlike Justice Frankfurter, interpreted the plurality opinion as holding that Ohio could not give comity effect to the Wisconsin decree as a matter of due process because the Wisconsin court lacked in personam jurisdiction over the defendant. See *id.* at 536-37 (Jackson, J., dissenting); cf. note 71 *supra*. In Justice Jackson's view, the fact that the children and the husband were domiciled in Wisconsin was sufficient to vest custody jurisdiction in the Wisconsin court and, thus, the Wisconsin decree was entitled to full faith and credit in Ohio. 345 U.S. at 538-42 (Jackson, J., dissenting).

75. See 345 U.S. at 530-32. The Wisconsin action was filed within a month after the mother had left Wisconsin with the children. *Id.* at 530.

76. See *id.* at 537-38 (Jackson, J., dissenting). See also *Gessler v. Gessler*, 78 So. 2d 722, 723 (Fla. 1955) (Florida court, in dismissing custody action brought by a noncustodial father for lack of personal jurisdiction over the mother, noted that Pennsylvania, where mother and children had most substantial contacts, was the best place to try the case).

77. 371 U.S. 187 (1962).

rendered by another. *Ford* further illustrates how the Court's approach sanctions child snatching.

In *Ford*, the father instituted a habeas corpus proceeding in Virginia seeking custody of his three children.⁷⁸ The parties eventually agreed that the father was to have custody, whereupon the Virginia court dismissed the petition.⁷⁹ Later, in a classic example of a parent trying to alter custody when equipped with the jurisdictional advantage,⁸⁰ the mother petitioned a South Carolina court for custody when the children were visiting her in that state.⁸¹ The Supreme Court of South Carolina reversed a lower court's grant of the request, finding that the dismissal by the Virginia court was *res judicata*, hence final and entitled to full faith and credit.⁸² The United States Supreme Court reversed, holding that the dismissal was not *res judicata* since the issue of custody could be relitigated in the Virginia courts.⁸³ Thus, the dismissal could have no greater effect in South Carolina than in Virginia and the South Carolina court's were therefore not barred from deciding who should be granted custody.⁸⁴

In reaching its decision that Virginia would not treat the dismissal of the action as *res judicata*, the Court was swayed by Virginia's strong public policy that all custody orders are modifiable because the welfare of the infant is paramount.⁸⁵ Consequently, the Court opined that it was unlikely that the Virginia courts would have been bound by a "mere order of dismissal."⁸⁶ Yet, despite the Court's seeming concern for the interests of the child, it failed to consider the great potential for harm to the child's welfare created by its countenance of conflicting custody orders.⁸⁷ If, in fact, the paramount issue ensuring optimum conditions for the welfare of the child, the Court should have been looking for the jurisdiction which could have best decided the issue with the least disruption to the child's life.⁸⁸

78. *Id.* at 188.

79. *Id.* The agreement was that the father would have custody of the children during the school year and the mother would have custody during vacations. *Id.*

80. For the typical facts of a child snatching case, see notes 20-21 and accompanying text *supra*.

81. 371 U.S. at 188.

82. See *Ford v. Ford*, 239 S.C. 305, 317, 123 S.E.2d 33, 39 (1961).

83. 371 U.S. at 192-93.

84. *Id.* at 194.

85. *Id.* at 192.

86. *Id.* at 194. The Court's conclusion was founded upon its belief that South Carolina would deem a dismissal based on a settlement to be *res judicata* only where there were strictly private interests at stake, and not, as in a custody case, where there is a strong public interest involved. *Id.*

87. See note 11 and accompanying text *supra*.

88. See Ratner, *Child Custody In A Federal System*, 62 MICH. L. REV. 795, 809 (1964). For further discussion of *Ford*, see Comment, *Ford v. Ford: Full Faith and Credit to Child Custody Decrees?*, 73 YALE L.J. 134 (1963).

It is important to note that the Supreme Court has never expressly held that valid custody decrees are not entitled to full faith and credit. Indeed, the Court has refused to do so on at least three occasions.⁸⁹ However, the thrust of the Court's custody opinions leads one to conclude that the Court has gone to great lengths to find a lack of finality⁹⁰ or invalidity⁹¹ in custody decrees, thus avoiding the constitutional issue resulting from relitigation of such orders.

IV. THE ENACTMENT OF THE UNIFORM AND COMMONWEALTH CHILD CUSTODY JURISDICTION ACTS

Clearly, the decisions of the United States Supreme Court and the Pennsylvania appellate courts did little to prevent a parent from taking a child across jurisdictional borders in violation of a prior custody decree with a resulting loss of jurisdiction in the court having the strongest contacts with the child.⁹² Against this background, the Pennsylvania Legislature began to grapple with the issue of interstate and intercounty custody disputes. Its response was the enactment of two separate pieces of legislation. The first was the UCCJA.⁹³ The second was the CCCJA.⁹⁴ Both Acts represent a complete rejection of prior national and state law as it pertained to custody jurisdiction.

A. *The UCCJA*

The drafters of the UCCJA sought to limit custody jurisdiction "to the state where the child has his home or where there are other strong contacts with the child and his family."⁹⁵ This goal has been implemented in part by vesting custody jurisdiction in the courts of the child's "home state."⁹⁶

The home state is defined in the UCCJA as the state where, immediately preceding the commencement of the custody proceed-

89. See, e.g., *Ford v. Ford*, 371 U.S. 187, 192 (1962); *Kovacs v. Brewer*, 356 U.S. 604, 607 (1958); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 615-16 (1947).

90. See, e.g., *Ford v. Ford*, 371 U.S. 187, 192-94 (1962).

91. See, e.g., *May v. Anderson*, 345 U.S. 528, 532-35 (1952).

92. See notes 17-19 and accompanying text *supra*.

93. PA. STAT. ANN. tit. 11, §§ 2301-2325 (Purdon Supp. 1980). The effective date of the Act was July 1, 1977. *Id.* § 2301. The UCCJA of Pennsylvania is a reciprocal Act for it requires Pennsylvania to recognize out-of-state decrees only if they were rendered in conformity with the Act. *Id.* § 2314. For a list of the states which have enacted the UCCJA, see note 2 *supra*.

94. PA. STAT. ANN. tit. 11, §§ 2401-2424 (Purdon Supp. 1980). The effective date of the Act was June 27, 1978. *Id.* § 2401.

95. UNIFORM CHILD CUSTODY JURISDICTION ACT, Commissioners' Prefatory Note, reprinted in 9 UNIFORM LAWS ANN. 111, 114 (1979). See Bodenheimer, *supra* note 71, at 1218.

96. For a discussion of the "home state" concept, see notes 97-99 and accompanying text *infra*.

ing, the child lived for at least six consecutive months or, in the case of an infant less than six-months old, since birth.⁹⁷ The Act provides that Pennsylvania has jurisdiction over a custody dispute when it is the home state of the child at the time of the initiation of the action,⁹⁸ or when it had been the home state of the child but the child is now absent because of removal or retention by a person claiming custody.⁹⁹

The concept of a home state is not the only basis of jurisdiction under the Act as there are four other grounds of jurisdiction which would allow Pennsylvania courts to hear a custody case.¹⁰⁰ In addition to the home state concept, a second ground permits Pennsylvania to assume jurisdiction over a custody dispute where the best interests of the child require it because 1) the child and at least one contestant have a "significant connection" with the Commonwealth,¹⁰¹ and 2) substantial evidence concerning the child's present or future care, protection, and personal relationships is available in Pennsylvania.¹⁰² A third basis permits Pennsylvania courts to exercise jurisdiction where the child is physically present in the state and has been abandoned,¹⁰³ or when the court's action is necessary to protect the child because he or she has been subjected to or is threatened with abuse or neglect.¹⁰⁴

The fourth basis for jurisdiction exists when the court finds that no other state would have jurisdiction under the three bases previously discussed, or when another state has declined to exercise jurisdiction on the ground that Pennsylvania is the more appropriate forum to determine custody of the child.¹⁰⁵ In either instance, it must be in the best interest of the child that Pennsylvania assume jurisdiction.¹⁰⁶

97. PA. STAT. ANN. tit. 11, § 2303 (Purdon Supp. 1980). This section also provides that periods of temporary absence are counted as part of the six-month period. *Id.*

98. *Id.* § 2304(a)(1)(i).

99. *Id.* § 2304(a)(1)(ii). For this subsection to apply, one parent must still continue to live in Pennsylvania. *Id.*

100. *Id.* §§ 2304(a)(2)-(5).

101. *Id.* § 2304(a)(2)(i).

102. *Id.* § 2304(a)(2)(ii). This significant contacts test may result in two states having jurisdiction: the home state and a state other than the home state which has the requisite contacts. To deal with such an event, the drafters of the Act developed a mechanism to determine the best forum and avoid jurisdictional conflicts. *See id.* §§ 2307-2308. The drafters, however, stressed that the Act requires interstate judicial cooperation and communication for the purpose of establishing the most convenient forum and avoiding simultaneous proceedings with inconsistent results. *See* UNIFORM CHILD CUSTODY JURISDICTION ACT § 7, Commissioners' Note *reprinted in* 9 UNIFORM LAWS ANN. 111, 139 (1979).

103. PA. STAT. ANN. tit. 11, § 2304(a)(3)(i) (Purdon Supp. 1980).

104. *Id.* § 2304(a)(3)(ii).

105. *Id.* § 2304(a)(4)(i).

106. *Id.* § 2304(a)(4)(ii).

The fifth and final basis for jurisdiction in Pennsylvania is present when "the child welfare agencies of the counties wherein the contestants for the child live, have made an investigation of the home of the person to whom custody is awarded and have found it to be satisfactory for the welfare of the child."¹⁰⁷

While physical presence of the child in Pennsylvania is desirable, it is not required for jurisdiction to vest under the Act.¹⁰⁸ Indeed, physical presence alone is not sufficient to confer jurisdiction.¹⁰⁹ In two circumstances, however, physical presence combined with another factor will suffice. The two factors, either of which combined with physical presence will confer jurisdiction, are: 1) where no other state would have jurisdiction or another state has declined jurisdiction in favor of Pennsylvania;¹¹⁰ or 2) where the child is abandoned or neglected.¹¹¹

There are certain instances where the assumption of jurisdiction under the Act is specifically forbidden. If, at the time of the institution of a custody action in Pennsylvania, a custody proceeding is pending in another state's court which is exercising jurisdiction in substantial conformity with the Act, Pennsylvania must not assume jurisdiction.¹¹² The only exception to this rule is where the other state stays its proceeding because Pennsylvania is a more appropriate forum or because of "other reasons."¹¹³

In addition, although the Act's jurisdictional provisions are equally applicable to either initial custody or modification proceedings,¹¹⁴ there are restrictions concerning the exercise of that jurisdiction in modification cases. The most basic restriction is that a Pennsylvania court cannot modify an out-of-state decree unless it appears that the issuing court no longer has jurisdiction under the Act.¹¹⁵

107. *Id.* § 2304(a)(5). This provision was added when Pennsylvania enacted this legislation and is not part of the Act drafted by the Commissioners on Uniform State Laws. See UNIFORM CHILD CUSTODY JURISDICTION ACT § 3, reprinted in 9 UNIFORM LAWS ANN. 111, 122-23 (1979).

108. PA. STAT. ANN. tit. 11, § 2304(c) (Purdon Supp. 1980).

109. *Id.* § 2304(b).

110. *Id.* § 2304(a)(4).

111. *Id.* § 2304(a)(3).

112. *Id.* § 2307(a).

113. *Id.*

114. *Id.* § 2304(a).

115. *Id.* § 2315(a)(1). This provision also permits the assumption of jurisdiction if the original state has declined to exercise jurisdiction to modify. *Id.* If Pennsylvania does assume modification jurisdiction, this section requires that the Pennsylvania court communicate with the other state court and "give due consideration to the transcript of the record and other documents of all previous proceedings" *Id.* § 2315(b). This section is designed to achieve greater stability of custody arrangements and to avoid forum shopping by creating a policy of deference to

One of the major goals of the UCCJA is to "deter abductions and other unilateral removals of children undertaken to obtain custody awards."¹¹⁶ The Act achieves this goal through the inclusion of a section which bases the exercise of jurisdiction on the conduct of the party seeking relief.¹¹⁷ Section 2309 of the Act, the clean hands provision, *prohibits* the Pennsylvania courts from exercising jurisdiction in a modification case "if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody."¹¹⁸ There is an exception to this rule when the court finds that the best interest of the child requires that it exercise jurisdiction.¹¹⁹

Similarly, in the case of initial custody jurisdiction, section 2309 states that a Pennsylvania court *may* decline jurisdiction if the person initiating a custody proceeding has "wrongfully taken the child from another state or has engaged in conduct intending to benefit his position in a custody hearing."¹²⁰ In either an initial custody or a modification proceeding, a party whose petition is dismissed under this clean hands provision is subject to having the court charge him "with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses."¹²¹

the original state's continuing jurisdiction. See UNIFORM CHILD CUSTODY JURISDICTION ACT § 14, Commissioners' Note, *reprinted in* 9 UNIFORM LAWS ANN. 111, 155 (1979).

116. PA. STAT. ANN. tit. 11, § 2302(a)(5) (Purdon Supp. 1980).

117. *Id.* § 2309.

118. *Id.* § 2309(b). This provision also permits a court to decline jurisdiction if the petitioner violates any other provision of a custody decree unless the petitioner can show that "the conditions in the custodial household are physically or emotionally harmful to the child." *Id.*

This subsection will apply only when the court has the power to modify under § 2315. See *id.* § 2315. For a discussion of the need for discretion in the court's exercise of its power to modify, see UNIFORM CHILD CUSTODY JURISDICTION ACT § 8, Commissioners' Note, *reprinted in* 9 UNIFORM LAWS ANN. 111, 143 (1979); Bodenheimer, *supra* note 71, at 1241.

119. PA. STAT. ANN. tit. 11, § 2309(b) (Purdon Supp. 1980). As the drafters of the UCCJA explained: "In the case of illegal removal or retention refusal of jurisdiction is mandatory unless the harm done to the child by a denial of jurisdiction outweighs the parental misconduct." UNIFORM CHILD CUSTODY JURISDICTION ACT § 8, Commissioners' Note, *reprinted in* 9 UNIFORM LAWS ANN. 111, 143 (1979).

120. PA. STAT. ANN. tit. 11, § 2309(a) (Purdon Supp. 1980). According to the drafters, "wrongfully taken" in this subsection means that "one party's conduct is so objectionable that a court in the exercise of its inherent equity powers cannot in good conscience permit that party access to jurisdiction." See UNIFORM CHILD CUSTODY JURISDICTION ACT § 8, Commissioners' Note, *reprinted in* 9 UNIFORM LAWS ANN. 111, 142-43 (1979).

This provision of the Act is essentially a codification of the "clean hands" doctrine, long recognized in courts of equity but first espoused in the custody jurisdiction context by Professor Ehrenzweig in a 1953 law review article. See *id.* at 142; Ehrenzweig, *supra* note 31, at 357-60. See also H. CLARK, *supra* note 31, § 11.5.

121. PA. STAT. ANN. tit. 11, § 2309(c) (Purdon Supp. 1980).

The foregoing provisions represent an attempt by the Pennsylvania Legislature to close the doors of the state's courts to parties engaged in interstate parental kidnapping. By attempting to delineate the circumstances under which a court may, or must, assume or decline jurisdiction,¹²² the Act is clearly intended to avoid the tenuous assumption of jurisdiction in cases such as *Irizarry* and its progeny.¹²³

Consider how the provisions of the UCCJA would have applied to the facts of *Irizarry*.¹²⁴ Upon learning of his ex-wife's improper retention of the children after the visitation period had expired, Mr. Irizarry, armed with his Puerto Rico custody order, would have sought an expedited hearing in the Pennsylvania court.¹²⁵ It is doubtful that the Pennsylvania court would have had jurisdiction to modify the Puerto Rico decree under any of the five UCCJA jurisdictional bases previously discussed.¹²⁶ The "home state"¹²⁷ of the children was Puerto Rico¹²⁸ since the children had lived there all of their lives.¹²⁹ There was no indication that the children had any significant connection with Pennsylvania other than two visitation periods.¹³⁰ There was no evidence of abuse or neglect of the children which would have allowed the court to assume jurisdiction in the children's interest.¹³¹ Furthermore, the provision allowing Pennsylvania to assume jurisdiction if no other state had jurisdiction¹³² would similarly have been inapplicable since Puerto Rico clearly would have been considered the "home state" and, thus, would have had jurisdiction.¹³³ In addition, the Pennsylvania courts would have had no power to modify the Puerto Rico decree under

122. See notes 95-120 and accompanying text *supra*.

123. For a discussion of *Irizarry* and its progeny, see notes 23-53 and accompanying text *supra*.

124. For a summary of the facts of *Irizarry*, see notes 23-35 and accompanying text *supra*.

125. See PA. STAT. ANN. tit. 11, § 2325 (Purdon Supp. 1980). This section provides:

"Upon the request of a party to a custody proceeding which raises a question of existence or exercise of jurisdiction under this act the case shall be given calendar priority and handled expeditiously." *Id.*

126. See notes 97-107 and accompanying text *supra*. See also PA. STAT. ANN. tit. 11, § 2304 (Purdon Supp. 1980).

127. For a discussion of the "home state" concept, see notes 96-99 and accompanying text *supra*.

128. As previously noted, the UCCJA is a reciprocal Act. See note 93 *supra*. As of this date, Puerto Rico has not yet adopted the Act but, for the purposes of this discussion, it will be assumed that the UCCJA would apply.

129. See 195 Pa. Super. Ct. at 106, 169 A.2d at 308.

130. See *id.*

131. See *id.*

132. PA. STAT. ANN. tit. 11, § 2304(a)(1) (Purdon Supp. 1980).

133. Moreover, § 2304(a)(5), the child welfare provision, would also have been inapplicable for there was no indication in *Irizarry* that such an investigation had ever occurred. See *id.* § 2304(a)(5); note 107 and accompanying text *supra*.

section 2315 because Puerto Rico would still have had jurisdiction while Pennsylvania, as far as can be determined, would not.¹³⁴ Thus, if a case identical to *Irizarry* arose today, Pennsylvania would lack the power to determine custody.

Even assuming *arguendo* that a Pennsylvania court would have had jurisdiction in the technical sense, the clean hands provision of the Act, section 2309, would still have required the court to dismiss the case.¹³⁵ The conduct of the mother in improperly retaining the children at the end of the visitation period is a striking example of the type of action which section 2309 was intended to deter.¹³⁶ Therefore, the outcome of *Irizarry* under the UCCJA would be the complete opposite of the superior court's determination which allowed the mother to relitigate the issue of custody.¹³⁷

B. The CCCJA

With the enactment of the CCCJA, the parent who takes his child across county borders in Pennsylvania in order to relitigate custody faces the same result the UCCJA imposes on the parent who crosses state lines. Modeled upon the UCCJA, the purpose of the CCCJA is to discourage parental kidnapping within the borders of the Commonwealth.¹³⁸ As previously discussed, the decisions of the Pennsylvania appellate courts allowed the child's home county to be ousted from jurisdiction, even though the child was taken in contravention of an existing custody order.¹³⁹ If only the UCCJA, which deals exclusively with interstate acts, had been passed in Pennsylvania, the legislature would have permitted parental kidnapping to continue intrastate, while discouraging it between states.¹⁴⁰

The bases for the assumption of jurisdiction under the CCCJA are essentially the same as those under the UCCJA,¹⁴¹ although the

134. See PA. STAT. ANN. tit. 11, § 2315 (Purdon Supp. 1980).

135. *Id.* § 2309.

136. See UNIFORM CHILD CUSTODY JURISDICTION ACT § 8, Commissioners' Note, reprinted in 9 UNIFORM LAWS ANN. 111, 143 (1979).

137. Not only would the mother in *Irizarry* have lost under the Act, but she would also have faced the possible imposition of attorney fees and expenses. See PA. STAT. ANN. tit. 11 § 2309(c) (Purdon Supp. 1980).

138. See *id.* § 2402(a)(5) (Purdon Supp. 1980); 1 PA. LEG. J. 1092-93 (House, daily ed. April 12, 1978) (remarks of Rep. Rhodes).

139. See notes 39-47 and accompanying text *supra*.

140. See, e.g., PA. LEG. J. 1092-93 (House, daily ed. April 12, 1978) (remarks of Rep. Rhodes); Turner, *Pennsylvania's New Child Custody Venue and Jurisdiction Legislation*, 49 PA. B.A.Q. 471, 473-74 (1978).

141. See PA. STAT. ANN. tit. 11, § 2404 (Purdon Supp. 1980). In the CCCJA, the concept of the "home state" is referred to as the "home jurisdiction." *Id.* § 2404(a)(i).

section providing for jurisdiction following the investigation of the custodial home by a child welfare agency¹⁴² was omitted in the CCCJA. Another significant difference between the Acts is found in the CCCJA's clean hands provision.¹⁴³ In the case of an initial custody petition, the CCCJA expressly mandates that Pennsylvania courts "shall decline to exercise jurisdiction" when the petitioner has "wrongfully taken the child from another jurisdiction or has engaged in improper conduct intending to benefit his position in a custody proceeding."¹⁴⁴ This differs from the UCCJA in that, under the interstate Act, it is within the discretion of the Pennsylvania courts whether or not they should decline jurisdiction.¹⁴⁵

In the case of a party seeking a modification of a custody decree, the CCCJA's clean hands provision is essentially identical to that of the UCCJA. Under both the interstate and intrastate Acts, a court is *required* to decline jurisdiction when the person seeking modification has either improperly removed the child from the custodial parent or has improperly retained the child after visitation.¹⁴⁶ An additional ground for declining jurisdiction in modification proceedings exists under the CCCJA where the child is removed from the jurisdiction of the court which entered the initial decree without twenty days' written notice being given to that court and to "any party entitled to custody or visitation rights"¹⁴⁷ The practical effect of this provision is to prevent the custodial parent from removing the child from the initial jurisdiction and then attempting, without advance notice, to modify the other parent's visitation rights in another county far from the noncustodial parent's residence. This provision attempts to alleviate the problem faced by the noncustodial parent who is often unable to enforce his *prima facie* right to visitation because of his inability to locate the child.¹⁴⁸

The only exception to the CCCJA's clean hands provision applies when the petitioner proves that "the conditions in the custodial household are physically or emotionally harmful to the child" and, therefore, the exercise of jurisdiction is in the interest of the child despite the otherwise contemptuous conduct of the petitioner.¹⁴⁹

142. See *id.* § 2304(a)(5); note 107 and accompanying text *supra*.

143. PA. STAT. ANN. tit. 11, § 2409 (Purdon Supp. 1980).

144. *Id.* § 2409(a).

145. See note 120 and accompanying text *supra*.

146. See PA. STAT. ANN. tit. 11, §§ 2309(b), 2409(b)(1)-(2) (Purdon Supp. 1980); notes 116-18 and accompanying text *supra*. An exception to this requirement exists under both Acts when "the interest of the child" necessitates that the court assume jurisdiction. See note 119 and accompanying text *supra*; text accompanying note 149 *infra*.

147. PA. STAT. ANN. tit. 11, § 2409(b)(3) (Purdon Supp. 1980).

148. See notes 48-51 and accompanying text *supra*.

149. See PA. STAT. ANN. tit. 11, § 2409 (Purdon Supp. 1980).

Thus, with the enactment of the UCCJA and the CCCJA, the Pennsylvania Legislature has emphatically declared a strong public policy: a parent may not take his children from the custodial parent in violation of a subsisting court order. Such a parent will not find a court in Pennsylvania ready to relitigate rights to custody that had previously been denied in another forum. As will be discussed, the Acts are not without problems and potential loopholes.¹⁵⁰ Nevertheless, with the passage of these bills, in three short years the Commonwealth of Pennsylvania had come full circle on the issue of parental kidnapping.

V. CASE LAW AFTER THE ENACTMENT OF THE UCCJA AND THE CCCJA

Shortly after the Pennsylvania Legislature rejected the jurisdictional concepts traditionally applied in the Pennsylvania courts by adopting the UCCJA and the CCCJA, the courts also began to reject the old law in cases initiated prior to the effective dates of the Acts and, hence, to which the Acts technically were not yet applicable.¹⁵¹ However, the notion that there was a right to relitigate custody determinations in Pennsylvania did not die quickly. Indeed, as late as April 1978, Judge Hoffman issued a vigorous dissent in *Reed v. High*,¹⁵² where the superior court agreed in essence to be bound by an ex parte custody decree rendered by a Mississippi court.¹⁵³

In *Reed*, a habeas corpus action, the superior court held per curiam that the Pennsylvania lower court had given the respondent a sufficient opportunity to show a change in circumstances before it granted the Mississippi decree full faith and credit.¹⁵⁴ Thus, the court refused to allow any inquiry into the facts of the initial decree. In a lengthy dissent, Judge Hoffman correctly pointed out that the

150. See notes 179-94 and accompanying text *infra*.

151. See *In re Sagan*, 261 Pa. Super. Ct. 384, 396 A.2d 450 (1978); *Trefsgar v. Trefsgar*, 261 Pa. Super. Ct. 1, 395 A.2d 273 (1978); *Reed v. High*, 254 Pa. Super. Ct. 367, 385 A.2d 1384 (1978); notes 152-78 and accompanying text *infra*.

152. 254 Pa. Super. Ct. 367, 372, 385 A.2d 1384, 1386 (1978) (Hoffman, J., dissenting).

153. *Id.* at 369, 385 A.2d at 1384. The mother contended that she did not appear at the Mississippi hearing on the advice of her attorney. *Id.* at 368, 385 A.2d at 1384. Subsequently, she fled to Rhode Island with the child where the father was again awarded custody after a hearing. *Id.* The mother then came to Pennsylvania where the father instituted this habeas corpus proceeding. *Id.* The lower court gave custody to the father after affording the mother the opportunity to show a change in circumstances, which she was unable to do. *Id.*

154. *Id.*, citing *In re Irizarry*, 195 Pa. Super. Ct. 104, 169 A.2d 307, *cert. denied*, 368 U.S. 928 (1961).

court's decision represented a departure from prior case law¹⁵⁵ which he believed wisely subordinated full faith and credit considerations to the state's interest in the well-being of the children involved.¹⁵⁶

The Pennsylvania superior court's unwillingness to show any sympathy for snatching parents during this interim period between the enactment and effective dates is further illustrated by *Trefsgar v. Trefsgar*.¹⁵⁷ In *Trefsgar*, the superior court reversed a lower court's award of custody to a father who had instituted the custody proceeding during his child's weekend visit.¹⁵⁸ The superior court did not base its decision on any jurisdictional notions or concepts of full faith and credit, but rather found that it was in the best interest of the child for her to be with her mother.¹⁵⁹ In so holding, the majority found the father's actions in violating a valid custody order by retaining the child after visitation to be a significant factor.¹⁶⁰ The court stated: "The mother . . . went through the necessary legal channels to secure permanent custody of the child and was successful. The father chose not to contest the [Maryland] custody decree Hence his actions were in direct contradiction of the law, and this fact should have been recognized by the lower court."¹⁶¹

While the majority in *Trefsgar* indicated that the father's actions were merely a factor in determining who should have custody,¹⁶² Judge Spaeth, in a concurring opinion, stated his belief that such conduct should be determinative.¹⁶³ He pointed out that both parents appeared equally able to serve the child's best interests and, thus, he faced the question of how such a case should be decided now that the tender years presumption, which would have tipped the balance in favor of the mother, was no longer applicable in a custody

155. See 254 Pa. Super. Ct. at 377-80, 385 A.2d at 1389-91 (Hoffman, J., dissenting), citing *Commonwealth ex rel. Rogers v. Daven*, 298 Pa. 416, 148 A. 524 (1930); *Friedman v. Friedman*, 224 Pa. Super. Ct. 530, 307 A.2d 292 (1973). For a discussion of the law regarding the finality of custody decrees in Pennsylvania and the nation prior to the enactment of child custody acts, see notes 17-91 and accompanying text *supra*.

156. See 254 Pa. Super. Ct. at 380, 385 A.2d at 1390-91 (Hoffman, J., dissenting).

157. 261 Pa. Super. Ct. 1, 395 A.2d 273 (1978).

158. *Id.* at 4-8, 395 A.2d at 275-77. After she had separated from her husband in Pennsylvania, Mrs. Trefsgar took their daughter to Maryland. *Id.* at 3, 395 A.2d 274-75. She then obtained a custody award in a Maryland court proceeding of which the father had notice. *Id.* at 3-4, 395 A.2d at 275.

159. *Id.* at 8, 395 A.2d at 277. Apparently the lower court had followed prior Pennsylvania law in allowing a hearing *de novo*.

160. *Id.* at 6-7, 395 A.2d at 276.

161. *Id.* at 7, 395 A.2d at 276.

162. *Id.* at 6-8, 395 A.2d at 276-77.

163. *Id.* at 10-11, 395 A.2d at 278 (Spaeth, J., concurring).

case.¹⁶⁴ Judge Spaeth maintained that he would still have struck the balance in favor of the mother, not because of the tender years presumption, but rather because of the father's culpable conduct in ignoring the prior custody decree and detaining the child.¹⁶⁵ In dictum, Judge Spaeth also noted that, although not controlling in *Trefsgar*, the UCCJA might avoid the problems presented in that case.¹⁶⁶

The decision in *Trefsgar*, with its criticism of the parent who takes the law into his own hands for the purpose of establishing a jurisdictional advantage,¹⁶⁷ foreshadowed the superior court's decision in *In re Sagan*.¹⁶⁸ In *Sagan*, the court formally rejected its former jurisdictional approach and adopted the test of the UCCJA, even though the Act was technically inapplicable.¹⁶⁹

In *Sagan*, a New York court had awarded custody to the mother.¹⁷⁰ The father, while one of the children was visiting him in Pennsylvania, instituted a custody action.¹⁷¹ The superior court reversed a lower court's grant of the father's petition, holding that the court of common pleas lacked subject matter jurisdiction to determine custody *despite the physical presence of the child in Pennsylvania*.¹⁷²

In so holding, the *Sagan* court pointed out that there are competing interests at stake in these cases.¹⁷³ Although recognizing that

164. See *id.* at 9-10, 395 A.2d at 277-78 (Spaeth, J., concurring), citing *Commonwealth ex rel. Spriggs v. Carson*, 470 Pa. 290, 368 A.2d 635 (1977) (other citations omitted). The tender years doctrine carried a presumption that "the natural mother of a child of tender years was entitled to its custody." See A. MOMJIAN & N. PERLBERGER, *supra* note 21, § 5.1.1(b)1 (footnote omitted).

165. 261 Pa. Super. Ct. at 10-11, 395 A.2d at 278 (Spaeth, J., concurring).

166. *Id.* at 11, 395 A.2d at 278 (Spaeth, J., concurring).

167. *Id.* at 6-7, 395 A.2d at 276.

168. 261 Pa. Super. Ct. 384, 396 A.2d 450 (1978).

169. See *id.* at 389-90 & n.5, 396 A.2d at 453 & n.5. The UCCJA was inapplicable in *Sagan* because the petition for custody was filed prior to July 1, 1977, the effective date of the Act. *Id.* See note 93 *supra*.

170. 261 Pa. Super. Ct. at 387, 396 A.2d at 451. The parents had married in 1960 and in 1970 they moved to Ithaca, New York. *Id.* at 386, 396 A.2d at 451. In 1973, they separated and the father relocated in Lawrence County, Pennsylvania. *Id.* at 387, 396 A.2d at 451. Custody was awarded to the mother in 1975 and the parties were ultimately divorced in 1976. *Id.*

171. *Id.* at 387, 396 A.2d at 451.

172. *Id.* at 389-90, 396 A.2d at 452-53. The court discussed Pennsylvania's old jurisdictional law which rested jurisdiction on either domicile or residence. See *id.* at 387-88, 396 A.2d at 452, citing *Commonwealth ex rel. Logan v. Toomey*, 241 Pa. Super. Ct. 80, 84, 359 A.2d 468, 470 (1976); *Swigart v. Swigart*, 193 Pa. Super. Ct. 174, 177, 163 A.2d 716, 718 (1960). The court then stated: "Appellee would have us equate residence with mere physical presence within the jurisdictional borders, without reference to the understanding which the parents have with respect to the duration of that presence. . . . However, we are unwilling to do so." *Id.* at 389, 396 A.2d at 452-53 (citation omitted).

173. See *id.* at 389-90, 396 A.2d at 453.

its prior approach, which would have allowed relitigation of custody, probably resulted in legalized abduction of children,¹⁷⁴ the court also recognized that such relitigation was consistent with Pennsylvania's legitimate concern about the welfare of children in the state.¹⁷⁵ The court balanced these interests by stating: "The experience of recent years . . . has demonstrated that the most appropriate way to reconcile this dilemma of the state's *parens patriae* concern for the welfare of those children living within its boundaries . . . on the one hand, and 'legalized abduction' on the other is to restrict jurisdiction."¹⁷⁶ Noting the recent adoption of the UCCJA,¹⁷⁷ the court ended its practice of protecting the kidnapping parent by stating:

[W]e hold that unless there is evidence that a minor child has been abandoned or physically abused, where another state's court has awarded custody to the parent domiciled in that other state, and that parent has allowed the child to *visit temporarily* with the other parent in Pennsylvania, the child is not a resident of Pennsylvania, nor does Pennsylvania have sufficient interest in that child's well being to merit the assumption of jurisdiction by its courts to relitigate the matter of custody.¹⁷⁸

VI. FUTURE PROBLEMS

Despite the public policy against child snatching contained in the Acts, anyone experienced in the litigation of such cases cannot read them without some concern. One troublesome area involves the interplay between the *In re Sagan* decision and the UCCJA. The UCCJA expressly states that it applies only where the other state involved exercised "jurisdiction substantially in conformity" with the UCCJA or a similar law.¹⁷⁹ The *Sagan* case's jurisdictional pronouncements, however, appear equally applicable to all interstate custody disputes without regard to the jurisdictional rules of any other state involved.¹⁸⁰ Consider the situation where the UCCJA is inapplicable because the other state did not exercise jurisdiction

174. *Id.*

175. *Id.*

176. *Id.* (citations and footnote omitted).

177. *Id.* at 390 n.4, 396 A.2d at 453 n.4. The court added "that absent extraordinary circumstance, Pennsylvania has no inherent concern for those children who are domiciled elsewhere and temporarily present solely for the purposes of visit." *Id.* at 390, 396 A.2d at 453.

178. *Id.* at 390, 396 A.2d at 453 (emphasis in original).

179. PA. STAT. ANN. tit. 11, § 2307(a) (Purdon Supp. 1980). This provision, however, provides an exception to the rule stated in the text for it allows the Pennsylvania courts to assume jurisdiction in the event that the other state involved has stayed its proceedings because Pennsylvania is a more appropriate forum. *Id.*

180. See note 178 and accompanying text *supra*.

"substantially in conformity" with the Act. What law is then applicable? Arguably, a Pennsylvania court would look to the *Sagan* decision. In applying *Sagan* to such a case, however, the courts would be enforcing the UCCJA principles in a situation which the Act itself specifically excepts. The effect is to read this exception out of the Act. This result is, fortunately, more intellectually stimulating than practically damaging. The injury, if any exists, is a lessening of uniformity among UCCJA states, but the public policy behind the Act does not appear to be violated.

A second question which arises from considering the Acts in conjunction with *Sagan* is whether lower courts will read that decision as a signal that their rulings will be reversed if they are too quick to assume jurisdiction under the "significant connection" standard of the UCCJA.¹⁸¹ By indicating that temporary visitation in Pennsylvania under an out-of-state order does not trigger *any* interest in Pennsylvania for the welfare of the child which would allow the assumption of jurisdiction, *Sagan* cautions against activism.¹⁸² Indeed, a Pennsylvania lower court has intimated that a significant connection between Pennsylvania and two minor children did not exist where the children had not been present in the state for twenty-one consecutive months prior to the custody proceeding, even though the children had resided here for a longer period previously.¹⁸³ If the courts continue to be so influenced by *Sagan*, then a potential loophole in the UCCJA may be closed.

Another potentially significant loophole in both Acts is found in the language which allows the assertion of jurisdiction in a custody dispute even though the petitioner has improperly removed the child from the custodian if it is "in the interest of the child."¹⁸⁴ This language creates the possibility that an abducting parent can avoid

181. PA. STAT. ANN. tit. 11, § 2304(a)(2)(i) (Purdon Supp. 1980).

182. See notes 173-78 and accompanying text *supra*.

183. See *Stubblefield v. Dong My Ha*, 10 Pa. D. & C.3d 751, 753 (C.P. Lancaster 1978). *Stubblefield* involved two unmarried parents who lived together in Lancaster County with their natural children. *Id.* When they separated in 1976, the father took the children with him to Oregon. *Id.* In 1978, the mother took the children back to Pennsylvania without the father's consent and initiated this custody proceeding. *Id.* In dictum, the court maintained that Pennsylvania did not have jurisdiction over the matter since Oregon was the home state and there was no significant connection present. See *id.* Nevertheless, the court did not find it necessary to make that determination for it held that Pennsylvania was an inconvenient forum. *Id.*, citing PA. STAT. ANN. tit. 11, § 2308 (Purdon Supp. 1980). The court also pointed out that the assumption of jurisdiction in this particular case would contravene one of the purposes of the act which is to "deter abductions and unilateral removals of children." 10 Pa. D. & C.3d at 754, citing PA. STAT. ANN. tit. 11, § 2302(5) (Purdon Supp. 1980).

184. See Uniform Child Custody Jurisdiction Act, PA. STAT. ANN. tit. 11, § 2309(b) (Purdon Supp. 1980); Commonwealth Child Custody Jurisdiction Act, PA. STAT. ANN. tit. 11, § 2409(b) (Purdon Supp. 1980).

the Acts' clean hands provisions, which are clearly intended to deter such abductions,¹⁸⁵ by merely averring adverse conditions in the custodial home. One state had already opened the door to such machinations.¹⁸⁶

An initial question which must be considered is why there is a need for such an exception in the Acts at all? The entire concept of the UCCJA is based upon ending provincial fears and establishing mutual trust between courts of the various states.¹⁸⁷ It is therefore anomalous in light of the focus of the Acts to maintain that a foreign court is better able to evaluate evidence of neglect or abuse in the home state than is the home state itself. Indeed, in such cases it is particularly important that all relevant evidence be accessible to the deciding court. Most likely, this evidence will be best gleaned in a hearing in the child's home jurisdiction.¹⁸⁸ Thus, it is submitted that the exception to the clean hands provision is unnecessary.

Certainly, situations may exist where there truly are reasons to be concerned about the child's welfare if the snatching parent is forced to return to the home state to litigate custody. In such a case, however, a court in the home state can always make use of its own child abuse procedures to protect the child during the pendency of the custody litigation.¹⁸⁹ The solution which will protect the child from harm does not lie in allowing allegations of abuse and neglect to confer jurisdiction on a court which may be thousands of miles away from the most relevant information about the child.¹⁹⁰

185. See notes 116-21 & 143-48 and accompanying text *supra*.

186. See *Moser v. Davis*, 364 So. 2d 521, 522 (Fla. Dist. Ct. App. 1978). In *Moser*, the Florida court found that jurisdiction existed because of the petitioner's allegations that there was violence in the custodial home. *Id.*

187. See UNIFORM CHILD CUSTODY JURISDICTION ACT, Commissioners' Prefatory Note, reprinted in 9 UNIFORM LAWS ANN. 111, 114 (1979).

188. See Note, *Family Law: Court's Adoption of Uniform Child Custody Jurisdiction Act Offers Little Hope of Resolving Child Custody*, 60 MINN. L. REV. 820, 833 (1976).

189. See Child Protective Services Law, PA. STAT. ANN. tit. 11, §§ 2201-2224 (Purdon Supp. 1980). This Act sets forth the procedures by which a child in Pennsylvania can be held in protective custody. See *id.* For a discussion of the approaches of various states to the problems of child abuse, see generally Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 445 (1978).

190. See Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Currie and A Proposed Uniform Act*, 38 S. CAL. L. REV. 183, 185-86 (1965). Professor Ratner remarked:

An established home forum is probably consistent with the reasonable expectations of each parent and not too inconvenient for the non-resident. Often that parent has previously lived there and, in any event, has had a continuing significant contact with the place where his child last lived for a substantial period. The state where a child is physically present may always remove the child from the control of a person who is there abusing it, but that state is not by reason of such general authority necessarily the best venue for litigating a custody dispute between the . . . parents of any child there present. *Id.* (footnote omitted).

If the UCCJA is going to continue to allow courts to assume jurisdiction in the best interest of the child, then unambiguous standards must be provided, defining when the state's interest in the child's welfare is sufficient to allow the court to assume jurisdiction. As the Acts stand today, the child welfare exception results in a state of affairs where there are no clear guidelines as to when a court must decline jurisdiction because of the petitioner's bad conduct.¹⁹¹ The only "defined" standard in both Acts exists in the situation where an abducting parent requests another state to modify and that parent has violated a provision of the decree other than the provision concerning who should have the child.¹⁹² In such a case, the court may (under the UCCJA) or shall (under the CCCJA) decline jurisdiction "unless the petitioner can show that conditions in the custodial household are physically or emotionally harmful to the child."¹⁹³ Yet even this standard is ambiguous as virtually anything not "in the interest of the child" is arguably harmful to the child's emotional or physical health. Therefore, it is suggested that courts should at least require criteria similar to the equity standard of "immediate and irreparable harm"¹⁹⁴ before opening their doors to abducting parents.

VII. CONCLUSION

In the last three years, Pennsylvania has come full circle in its approach to the problem of parental kidnapping. Nevertheless, despite this change in the attitude of both the courts and the legislature, there still remains the possibility of Pennsylvania sanctioning child snatching under the ambiguous guise of the best interest of the child.¹⁹⁵ As discussed, however, this jurisdictional exception seems unwarranted in light of the focus of the Acts.¹⁹⁶ Fortunately, the loopholes created by the exception can be closed either through nar-

191. For a discussion of how the clean hands provisions permit a court to exercise jurisdiction, despite bad conduct, because of the "best interest of the child" exception, see notes 184-90 and accompanying text *supra*.

192. See Uniform Child Custody Jurisdiction Act, PA. STAT. ANN. tit. 11, § 2309(b) (Purdon Supp. 1980); Commonwealth Child Custody Jurisdiction Act, PA. STAT. ANN. tit. 11, § 2409(b) (Purdon Supp. 1980). The CCCJA also applies this standard with respect to initial jurisdiction in an abduction case. See *id.* § 2409(a).

193. Uniform Child Custody Jurisdiction Act, PA. STAT. ANN. tit. 11, § 2309(b) (Purdon Supp. 1980); Commonwealth Child Custody Jurisdiction Act, PA. STAT. ANN. tit. 11, § 2309(a)(b) (Purdon Supp. 1980).

194. See, e.g., *United States v. American Friends Serv. Comm.*, 419 U.S. 7, 11 (1974); *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974).

195. See notes 184-94 and accompanying text *supra*.

196. See notes 187-90 and accompanying text *supra*.

row judicial interpretation or hopefully through legislative amendment.¹⁹⁷

Finally, it must be remembered that even the best of statutes and the finest case law will not completely resolve the problem. There will always be parents with sufficient means and/or determination who will defy court orders and secret their children from the rightful custodian in some unknown forum. It therefore appears that the final chapter on this sorry activity will only be written when such parents, who may believe they are acting out of love, realize that their actions may emotionally cripple their children for life.

197. See notes 189-94 and accompanying text *supra*.